IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL JURISDICTION

NOTICE OF MOTION NO.3126 OF 2003
IN
SUIT NO.2198 OF 1996

Hemavand Behram Irani ...Plaintiff
Vs.
Adi Khodamurad Dana & Ors. ...Defendants

Mr. M. L. Palan i/b. J.P. Thakkar for Plaintiff
Ms. Kamal Nichani with Mr. A.C. Bhoinwala for Defendant No.1
Mr. K.B. Irani for Defendant No.4
Defendants 2 and 3 absent, though served
Respondents absent, though served

CORAM: ROSHAN DALVI, J
DATED : 20 TH DECEMBER 2005

P.C.

1. The suit property is one bakery called New Ezad Bakery at Murad Manzil, at 147-149, Maulana Azad Road, Madanpura, Mumbai-8. The bakery initially belonged to a partnership firm consisting of the Plaintiff and the father of Defendant No.1. The father of Defendant no.1 was the senior partner. He expired on 19th June 1993. As per the terms of the partnership deed Defendant No.1 was admitted as a partner. The plaintiff and Defendant No.1 carried on partnership business by running the bakery.

The other heirs of the father of Defendant No.1 who are the relatives of Defendant No.1 filed an Administration Suit for administration of estate of deceased father of Defendant no.1 bearing No.3686 of 1994. Defendant No.1 was sought to be excluded from the estate. The main estate was the bakery premises.

2. The heirs of deceased father of Defendant No.1 are the Respondents in this Notice of Motion. They are the parties in the Administration suit also. The Respondents have been served with the Notice of Motion. They have not appeared, they have also not filed any affidavit in reply. Defendant No.1 supports the Plaintiff in this application.

3. There are 2 litigations between the parties with regard to the property - One is administration suit and the other is the partnership suit.

4. In the Administration suit Court Receiver came to be appointed. Two outsiders came to be inducted in the bakery premises. This induction was under a conducting agreement. The conducting agreement is stated to have expired by afflux of time. The conductors have been appointed agents of the Court Receiver since they were conducting the business at the time the Administration suit was filed. They are stated to be outsiders. They are joined as Defendant nos.2 and 3 in this suit. This Notice of Motion is directed mainly against these two defendants.

The Plaintiff seeks the relief of terminating the agency of Defendants 2 and 3 in that suit.

5. The Plaintiffs have applied for leave in that suit to take out Notice of Motion in this suit. That leave is applied for under Notice of Motion No.2735 of 2003 in the Administration Suit No.3686 of 1994. Leave has been granted to the Plaintiff to take out this Notice of Motion.

6. In this Notice of Motion Defendant No.3 was sought to be served at the bakery premises. The packet came to be returned. Thereafter the Advocates for Defendants 2 and 3 M/s. Bilawala and Company were served with the Notice of Motion. That service was effected through speed post. The affidavit of service filed by the Plaintiff shows the returned envelope sent to Defendant No.3 as well as the postal slip sent to M/s. Bilawala & Company by speed post. Defendants 2 and 3 have been represented by M/s. Bilawala and Company in this Notice of Motion earlier. The roznama of the order dated 16th September 2005 in this Notice of Motion before Justice Mohta shows the appearance of M/s. Bilawala and Company for Defendants 2 and 3.

7. Defendants 2 and 3 are mere conductors. Since they were in possession, they were appointed agents of Receiver. The conducting agreement is dated 27th April, 1992. This agreement is merely for conducting the

business for 11 months . Thereafter the period of business was extended. The affidavit in reply of Defendant No.2 himself filed in the Administration suit shows that after the expiry of the first conducting agreement a fresh conducting agreement was signed on 10th March 1993 which was for the period of 10 years. That agreement has also expired by afflux of time. Defendants 2 and 3 have no right, title and interest in the suit premises. They are admittedly mere conductors.

8. The Plaintiff has produced certain photographs of suit premises showing that the suit premises have been allowed to be deteriorated by Defendants 2 and 3.

9. In para 13 of the affidavit in support of this Notice of Motion, the Plaintiff has stated that the Defendants have allowed hawkers in front of the bakery and gave them electricity connection.

10. The Plaintiff therefore requires the Agency Agreement to be terminated. Mr. Palan, on behalf of the Plaintiffs, stated that the Plaintiffs or Defendant No.1 or even any of the other heirs may be appointed agent of the Court Receiver in place instead of Defendants 2 and 3.

11. Defendants 2 and 3 are regularly paying royalty amount of Rs.8500/- to the Court Receiver. Any party who is appointed in the place instead of Defendants 2 and

3 must therefore not only carry out complete repairs to the suit premises at his/her cost, but also offer to pay royalty of a higher amount.

12. This suit as well as the Administration suit deserve to be settled through mediator. Such settlement would enure for the benefit of the parties includingthe Plaintiff and all the heirs of the deceased father of Defendant No.1. Until that is done and in view of this application, the party who offers the highest royalty should be allowed to be the Agent of the Court Receiver in the place and stead of Defendants 2 and 3.

13. Hence, following order:

(a) The Agency of Defendants 2 and 3 granted by the Court Receiver appointed in Suit No.3686 of 1994 is terminated.

(b) The Plaintiff, Defendant No.1, Defendant No.4 as well as the Respondents shall be entitled to bid for paying the royalty of the suit bakery. The minimum bid amount payable by any party shall be Rs.10,000/- per month.

(c) The aforesaid parties shall bid before the Court Receiver appointed in Suit No.3686 of 1994.

(d) The Court Receiver to act on the certified copy of this order.

(e) No order as to costs.

(ROSHAN DALVI, J.)